

CHAPTER VII

EMPLOYMENT

Section 3. Constructive Discharge Cases

TABLE OF CONTENTS

	<u>Page</u>
A. <u>Legal Standards for Constructive Discharge Cases</u>	
1. The Scope of This Section	2
2. The Legal Standard	3
3. Discussion of Legal Standard	4
B. <u>Analysis of Constructive Discharge Cases</u>	6
1. Analytical Outline	7
2. Explanation of Analytical Outline	8
C. <u>The Law: Sources of the Legal Standards for Constructive Discharge Cases</u>	14

A. Legal Standards for Constructive Discharge Cases

1. The Scope of This Section

Constructive discharge cases are those complaints in which the complainant claims the respondent took unlawful, discriminatory adverse actions against him or her because of his or her protected status (race, sex, etc.), and that these unlawful adverse actions created intolerable working conditions that forced the complainant to resign.

- Constructive discharge cases are different from "standard" termination cases because the respondent does not actually fire the complainant as it does in a "standard" termination case. (See Section 1 of Chapter VII for a discussion of "standard" termination cases.)
- Constructive discharge cases focus on Issue II. If the standards under that Issue are met, there are no affirmative defenses to excuse a constructive discharge.
- Some work-environment harassment cases may involve a constructive discharge. Since these cases have special problems, use the "Sexual Harassment Resulting in Constructive Discharge" analysis in "Sexual Harassment Cases", Section 6 of Chapter VII.

2. The Legal Standard

The FEHA and Commission precedential decisions (see section C for a listing of these decisions) have established the following multi-part legal standard for constructive discharge cases:

II. Discrimination

A constructive discharge is shown if:

1. The respondent took an unlawful discriminatory adverse action(s) against the complainant; and
2. The complainant resigned because the respondent's unlawful adverse actions made working conditions intolerable; and
3. The respondent either intended that its actions cause the resignation, or knew or should have known that its actions would cause the resignation. The respondent should have known resignation would result if a reasonable person in those circumstances would have quit.

3. Discussion of the Legal Standard

In many situations in which an employer takes a discriminatory adverse action against a current employee (such as demoting her, harassing her, denying her equal pay) the employer does not actually fire her, but the discriminatory adverse action nevertheless makes her situation so intolerable that she quits anyway. If certain requirements are met, the employer may be held liable not just for the original discriminatory adverse action, but for having "constructively discharged" the employee as well. The legal standard for constructive discharge states three requirements:

Part 1: Discriminatory Action

The first part of the legal standard asks, naturally, whether the adverse actions the respondent took against the complainant are themselves unlawful under the Act. For example, was a complainant demoted or harassed or denied a promotion because of his or her race? Was a complainant harassed because of his or her national origin? Was a complainant reassigned to harder tasks because he or she filed an FEHA complaint? If the respondent's adverse actions are not unlawful under the Act, the respondent cannot be held liable in turn for any resignation caused by its actions.

Each unlawful adverse action of this kind is itself a separate violation of the Act, and is therefore subject to the regular legal standards for that type of violation. These legal standards are fully discussed in other sections of this manual (e.g., Harassment, Sections 5 and 6; denial of promotion, Section 2, etc.).

Part 2: Forced Resignation

This part of the legal standard asks whether the effect the respondent's unlawful adverse actions had on the working conditions actually motivated the complainant to resign. Respondents frequently deny that their unlawful actions made working conditions intolerable enough to cause the complainant to resign. They assert, instead, that the complainant resigned for other reasons unrelated to discrimination.

The second element of the legal standard, then, focuses on whether the respondent's unlawful adverse actions did make the working conditions intolerable, and whether it was these intolerable working conditions that caused the complainant to resign, rather than some other reason.

It is sufficient if the worsened working conditions were at least one of the factors motivating the complainant to resign. They need not have been the sole or even the dominant cause.

Part 3: Respondent Liability for the Resignation

After it has been found, under Parts 1 and 2 of the legal standard, that the respondent's unlawful action caused the resignation, Part 3 of the standard asks whether the respondent can be held liable for the resignation it caused. The respondent will be liable if any one of the three tests is met:

a. Intent or Conscious Purpose

The respondent is clearly liable for the resulting resignation if its intent (its conscious purpose) in taking the original unlawful action against the complainant was to make his or her working conditions so intolerable that she would be forced to resign. This test is met if the goal of forcing the complainant to quit was at least one of the respondent's purposes; that goal need not be the respondent's sole or even dominant purpose.

b. Actual Knowledge

But such intent is often difficult to show, and the respondent may still be liable for the resulting resignation if the evidence shows that the respondent actually knew that its unlawful actions would cause the result, even if it did not actively intend to force the complainant to quit.

c. Constructive Knowledge - Respondent "Should Have Known"

And even if there is no evidence that the respondent actually knew that resignation would result, it is still accountable for that result if it had "constructive knowledge" that it would occur - that is, if the respondent "should have known" that the complainant would be forced to leave. The law says a respondent "should have known" if it is found that a "reasonable person" would have resigned under the circumstances.

In effect, this rule puts an obligation on employers to foresee the impact their actions will have on the ordinary person. If an employer takes an unlawful discriminatory action against an employee and the Commission decides that the average person would have quit as a result, the employer is liable for the constructive discharge even if it never crossed the employer's mind that the affected employee might quit.

This "reasonable person" standard should be carefully applied. It does mean, in general, that employers are not obliged to foresee all the quirks and peculiar susceptibilities of each employee. But the standard also looks to the likely conduct of a "reasonable person" under the circumstances. That means that the Commission will examine the likely conduct of a "reasonable person" of the complainant's protected status. If a Black complainant has been racially harassed, for example, the test will be how Blacks would react to such harassment, rather than how white managers think Blacks would react, or how a mythical "average person" might react.

B. Analysis of Constructive Discharge Cases

Analysis of constructive discharge cases focuses on Issue II. Because a constructive discharge always results from a prior unlawful action that is itself a separate violation of the Act, you should always analyze this action (or in some cases, actions) first, using a separate sub-Issue question for each distinct act of harm. Then add your analysis of the constructive discharge. For example:

II. Discrimination

- A. Did the respondent harass the complainant because of his or her national origin?

Relevant Questions:

- 1.
2. etc.

- B. Did the respondent demote the complainant because of his or her national origin?

Relevant Questions:

- 1.
2. etc.

- C. Did the respondent, by harassing and demoting the complainant, also constructively discharge him or her?

1. etc.

Your analysis of the unlawful actions that caused the complainant to resign should be the same analysis you would use for such actions if no constructive discharge had resulted. Typical Issue questions and relevant questions for these actions appear in the manual sections dealing with each type of action.

The following analytical outline contains typical sub-Issue and relevant questions for the constructive discharge segment of your analysis. If the unlawful adverse actions causing the constructive discharge are work-environment sexual harassment or work-environment harassment on any basis, be sure to use the analytical outline and typical relevant questions specifically designed for work-environment harassment resulting in constructive discharge contained in "Sexual Harassment Cases", Section 6 of Chapter VII.

NOTE: Lists of typical Issue and relevant questions do not represent all the questions that could possibly be asked in a given case but represent only the most typical or common types of evidence that should be considered. Remember, lists of typical questions are not a substitute for analytical thinking.

1. Analytical Outline

II. Discrimination

- A. Did the respondent take an adverse action(s) against the complainant because of his or her protected status (race, sex, etc.) or protected activity (opposition or participation)?
- B. Did the respondent constructively discharge the complainant (force him or her to resign) by its discriminatory adverse actions?
 - 1. Did the respondent take an adverse action(s) against the complainant because of his or her protected status or protected activity? (See II.A above.)
 - 2. Did the complainant resign because the respondent's discriminatory adverse action(s) made working conditions intolerable?

Relevant Questions:

- a. Is the respondent's reason for the complainant's resignation factually accurate?
 - b. Is there any other evidence to indicate that the complainant resigned because of the respondent's discriminatory adverse action(s)?
 - c. Were the complainant's working conditions made sufficiently intolerable to force the complainant to resign? (See II.A above.)
 - d. Were the working conditions made less intolerable by corrective action taken by the respondent?
- 3. Did the respondent intend to cause the complainant to resign, or have actual or constructive knowledge that resignation was likely to result?
 - a. Did the respondent intend to cause the complainant to resign?
 - b. Did the respondent have actual knowledge that resignation was likely to result?
 - c. Should the respondent have known that the complainant would resign because a reasonable person would have under the circumstances?

2. Explanation of Analytical Outline

II. Discrimination

- A. Did the respondent take an adverse action(s) against the complainant because of his or her protected status (race, sex, etc.) or protected activity (opposition or participation)?

In constructive discharge cases, a discriminatory adverse action or actions (e.g., denial of promotion, denial of equal pay, failure to transfer, etc.) on the part of the employer makes the complainant's situation so intolerable that the complainant is forced to resign. These situations always involve two or more separate potential acts of harm: 1) the discriminatory adverse action or actions that cause the intolerable working conditions, and 2) the constructive discharge itself.

Since the discriminatory adverse actions that cause the intolerable working conditions are themselves distinct acts of harm, for which there are separate remedies, they should first be analyzed separately. If there is more than one act of harm (and there usually is more than one), each adverse action for which there is a separate remedy should be represented by a separate sub-Issue question followed by a set of relevant questions appropriate to the nature of the adverse action and the basis on which it is alleged to have occurred. (See the other employment sections of Chapter VII: "Selection Cases," "Retaliation Cases," "Sexual Harassment Cases," etc., for analytical outlines containing typical Issue and relevant questions.) Even if the evidence does not establish a constructive discharge, it may nevertheless suffice to show that one or more of the adverse actions alleged to have caused the constructive discharge are themselves unlawful.

- B. Did the respondent constructively discharge the complainant (force her to resign) by its discriminatory adverse actions?

This sub-Issue question asks whether the complainant's resignation because of the respondent's discriminatory adverse actions can be considered a discharge or termination by the employer. In order for the complainant's voluntary resignation to qualify as a discriminatory constructive discharge, it must meet the following three-part legal standard:

1. Did the respondent take an adverse action(s) against the complainant because of her protected status or protected activity?

This part of the legal standard re-asks the same basic question as sub-Issue A above: Were the adverse actions (e.g., denial of promotion, denial of equal pay, denial of transfer, etc.) by the respondent "discriminatory" or unlawful under the FEHA? This question is repeated here because unlawful adverse actions, in addition to being independent violations in themselves, are also the first element of the legal standard for an unlawful or "discriminatory" constructive discharge. If the respondent's adverse actions are not unlawful under the Act, the respondent cannot be held

liable in turn for any resignation caused by its discriminatory adverse actions. The same evidence and conclusions dealt with under sub-Issue A (or under additional sub-Issue questions representing separate acts of harm) above can be used to answer this relevant question. Simply refer to this evidence here. There is no need to repeat it.

2. Did the complainant resign because the respondent's discriminatory adverse action(s) made working conditions intolerable?

This question asks whether the respondent's unlawful adverse actions actually did make the working conditions intolerable, and whether it was these intolerable working conditions that (at least in part) caused the complainant to resign, rather than some other reason. Four types of evidence typically bear on this question:

Relevant Questions:

- a. Is the respondent's reason for the complainant's resignation factually accurate?

Since this relevant question inquires into the complainant's motivation (that is, his or her "intent") in resigning, it is not surprising that the evidence we examine is similar to that examined where the respondent's motivation is in question. Just as the respondent offers an "alternative, nondiscriminatory reason" when accused of intentional discrimination, so it will offer here an alternative reason (a reason other than intolerable working conditions) why the complainant resigned. For example, the respondent may claim that the complainant left because of an offer of a better job. Just as in termination cases, we first test the soundness of this alternative reason by asking whether it is factually accurate. In the example, we check whether the complainant did in fact have an offer of a better job.

- b. Is there any other evidence to indicate that the complainant resigned because of the respondent's discriminatory adverse action(s)?

There may also be other kinds of evidence in the case bearing on the complainant's motivation for leaving the job. His or her own testimony, testimony about his or her statements around the time he or she left, documents (such as resignation letters or termination forms), and a variety of other types of evidence may be relevant to the question of the complainant's motivation. In several precedential decisions, the Commission found that a complainant's real motivation in resigning was intolerable working conditions despite the fact that the complainant expressed a different reason for resigning in a letter of resignation. Since statements in a letter of resignation may not reflect a complainant's real motivation in resigning, be sure to check the circumstances leading to the writing of any such letter very carefully.

- c. Were the complainant's working conditions made sufficiently intolerable to force the complainant to resign?

In addition to the evidence summarized above, a major indicator of the complainant's motivation in resigning is the degree of intolerability of the working conditions that the complainant claims led him or her to resign. The more intolerable the conditions were made by the respondent's discriminatory adverse actions, the more plausible is the complainant's claim that he or she resigned because of the respondent's adverse actions. The degree of "intolerability" will depend on the nature and extent of the discriminatory adverse actions. (Evidence as to the nature and extent of the respondent's adverse actions will already have been dealt with under sub-Issue A above. The same evidence can be referred to here.)

In general, the Commission's precedential decisions indicate that the Commission will look to the whole of the circumstances in deciding whether the situation was intolerable enough to warrant a conclusion that it did cause the complainant to resign. A single isolated adverse action (e.g., denial of one promotion) will usually not be enough unless it is particularly serious. On the other hand, a series of less serious incidents taken together may suffice.

When considering the "totality of the circumstances," the Commission will look at the entire history of discriminatory adverse actions taken against the complainant by the respondent during the complainant's employment, including discriminatory adverse actions that may have occurred more than one year before the filing of the complaint. For this reason, be sure to consider all the discriminatory actions that have been taken against the complainant.

Here are summaries of the accumulated acts of harm that the Commission has found intolerable enough to have forced resignation:

Xerox (80-26): A 49-year-old Complainant was forced to accept a demotion in status and responsibilities in lieu of an involuntary transfer to another state. Management also met with him on two separate occasions to tell him that if he did not find another job, his grade would be reduced and his salary frozen. The Complainant alleged that these adverse actions were taken because of his age and forced him to resign. The Commission found that these acts of harm, although not "solely" because of the Complainant's age, were sufficient, when taken together, to create intolerable working conditions

that caused the Complainant to quit. The adverse actions occurred over a one and one-half year period.

- City of Corcoran (80-31): A Black police officer was subjected to repeated racial slurs by other police officers, a sergeant, and by the chief of police. Complainant was also singled out for harsher supervision, and there was a deliberate effort, directed by the chief of police, to accumulate a negative file on him. All of these acts of harm, which occurred over a two-year period, were taken because of the Complainant's race. The Commission found that these adverse actions taken together were sufficient to force the Complainant to resign.
- Napa Housing Authority (81-12): Over a seven-year period, a female Complainant was repeatedly denied reclassification and upgrade and denied equal pay. She was treated differently from a similarly situated male in terms of compensation, and conditions and privileges of employment. The Commission found that these acts of harm occurred because of the Complainant's sex, and the sheer duration of these discriminatory adverse actions was enough to create intolerable working conditions that caused the Complainant to resign.
- Marriott Hotel (83-10): A Complainant of Mexican ancestry was subjected to repeated verbal slurs (work-environment harassment) by co-workers. The Respondent had actual knowledge of the harassment and failed to take corrective action. This work-environment harassment on the basis of the Complainant's ancestry, which occurred over a period of four months, was enough to meet the standards for intolerable working conditions and forced the Complainant to quit.
- Madera County (90-03): A female Complainant was subjected to a physical sexual attack and repeated verbal advances by her supervisor. After the harasser was demoted to non-supervisory status he continued to make verbal physical advances toward the Complainant. The Respondent had actual knowledge of the harassment and failed to take appropriate corrective action. The Complainant eventually suffered an emotional and physical breakdown, which culminated in a medical leave and subsequent resignation. The Commission

found that a reasonable person in the Complainant's circumstances would have resigned even sooner than the Complainant resigned.

- d. Were the working conditions made less intolerable by corrective action taken by the respondent?

One particular type of evidence may suggest that the conditions were not sufficiently intolerable to warrant resignation, even where the unlawful adverse actions are sufficiently serious. If the respondent takes corrective action quickly and strongly enough, the Commission could find the situation improved enough so that the complainant's resignation was not really compelled by his or her working conditions. Evaluate any corrective action taken by the respondent to see if it was timely, if it was appropriate to the situation, if it was really enforced, and if it really improved the situation for the complainant.

3. Did the respondent intend to cause the complainant to resign, or have actual or constructive knowledge that resignation would result?

This question addresses the third element of the legal standard, and asks whether any of the conditions is met that would make the respondent liable for the resignation that its unlawful conduct caused.

- a. Did the respondent intend to cause the complainant to resign?

This relevant question focuses on the respondent's conscious purpose in taking the unlawful action against the complainant. Is there any evidence that shows that the goal of forcing the complainant to resign was at least one of the purposes that respondent's agents or supervisors had in mind?

- b. Did the respondent have actual knowledge that resignation was likely to result?

This relevant question focuses on actual knowledge. Is there any evidence that an agent or supervisor of the respondent actually knew that the complainant was feeling forced out? For example, is there evidence that the complainant informed the respondent that he or she felt pressured to resign? Or, is there evidence that a co-worker to whom the complainant confided these feelings passed them on to the respondent?

- c. Should the respondent have known that the complainant would resign because a reasonable person would have under the circumstances?

This relevant question focuses on constructive knowledge. Even if the respondent did not actually know that

resignation would result, it would still be responsible for the resignation if it "should have known" that the complainant would be forced out. Commission precedential decisions hold that the respondent should have known resignation would result if a reasonable person in those circumstances would have quit.

Evaluate this relevant question in two steps. First, look again at the particular circumstances of the case (using the evidence from 2.c, above). What adverse actions were taken against the complainant? How serious and frequent were they? How long did they go on?

Now, try to determine how a "reasonable person" would react to these circumstances. How would most people in the complainant's situation react? If the Commission finds that the complainant himself or herself was unusually (that is, "unreasonably") sensitive and that most people in the complainant's shoes would not have felt forced to resign, it may not decide that the respondent should have known that he or she would quit. Obviously, the more extensive and burdensome the respondent's actions are in general, the more likely the Commission will be to find that most people would have quit.

Be careful, as you make this difficult judgment, to assess what people in the complainant's particular situation would have done. Male and non-minority managers are sometimes unaware of the sensitivities of their female and minority subordinates. The Commission will look not to these managers' own perceptions of how most people would react to their conduct, or to how most men or non-minorities would react. Instead, the Commission will ask how others of the complainant's protected status would feel under the circumstances. In effect, employers are charged with being aware of these feelings, and will be held liable if they are inattentive to them.

C. The Law: Sources of the Legal Standards for Constructive Discharge Cases

1. Statute

FEHA (Government Code) Section 12940(a)

2. Precedential Decisions

DFEH v. Xerox Corporation (Holzman) FEHC Dec. No. 80-26. Age (49) - constructive discharge (manager). Standard for determining whether employer intended to force resignation (whether Respondent knows or should have known), pages 11-12. Use of statistics in age cases.

DFEH v. City of Corcoran, Police Department (Simpson) FEHC Dec. No. 80-31. Race (Black) - constructive discharge (police officer). Many incidents of harassment support a finding of intolerable working conditions, pages 13-17; use of hearsay evidence.

DFEH v. City of Napa Housing Authority (Sebia) FEHC Dec. No. 81-12. Sex (female) - denied reclassification and promotion (from secretary to management assistant); compensation discrimination and constructive discharge. Constructive discharge supported by seven-year duration of adverse acts and Respondent's actual knowledge that resignation would result, pages 24-25.

DFEH v. Marriott Hotel (Viodes) FEHC Dec. No. 83-10. Ancestry (Mexican-American) - work environment harassment by co-workers and constructive discharge. Actual knowledge by Respondent and no corrective action. In absence of actual knowledge, knowledge will be imputed if Respondent failed to take all reasonable steps to prevent harassment from occurring.

DFEH v. Jack's Restaurant and Jack Schat, Owner (Johnson) FEHC Dec. No. 84-08; re-issued as non-precedential FEHC Dec. No. 89-13 (September 4, 1989, withdrew compensatory and punitive damages). Sex (female) - work environment sexual harassment and constructive discharge (waitress). Resignation reasonable as response to repeated verbal and physical harassment by owner/manager. Standard for determining whether respondent "should have known" resignation would result: whether a reasonable person would have resigned under the same circumstances, pages 9-11.

DFEH v. Hart and Starkey, Inc. dba Shakey's Pizza Parlor (Perez, Reeder, Shaw-Watson, and Shaw) FEHC Dec. No. 84-23. Sex (female) - work environment sexual harassment and constructive discharge. Respondent liable for supervisor's conduct after working hours and liable even when harassing supervisor is not victim's own supervisor. Actual knowledge that resignation likely, pages 26-31.

DFEH v. Del Mar Avionics and Coy Wall, Its Supervisor and Agent (Thompkins) FEHC Dec. No. 85-19. Sex, female, and Race (Black) - work environment racial and sexual harassment, constructive discharge (quality control inspector). Constructive discharge substantiated by: 1) Complainant telling co-workers that she "had no choice but to quit;" 2) supervisor harasser told Complainant he meant to force her out, pages 23-24.

DFEH v. Madera County; Madera County Civil Service Commission; Madera County Assessor Richard Gordon; and Lawrence (Jerry) Marsh (Hauksdottir). FEHC Dec. No. 90-03. Sex (female) - work environment sexual harassment, failure to take steps to prevent and stop harassment, and constructive discharge (Appraiser I). Continued co-worker sexual advances after victim complained about harassment.

DFEH v. Huncot Properties and Charles Thomas (Harley) FEHC Dec. No. 88-21 (91-10; Order Modifying Decision Upon Remand, 5/23/91). Sex (female) - work environment sexual harassment and constructive discharge (receptionist). Complainant constructively discharged after one act of physical harassment by immediate supervisor, page 11.

DFEH v. Barbara Rosenberg, individually and dba TMC Motorsports; Jim Martin, as an employer and an individual (Hageman Opp) FEHC Dec. No. 90-09. Sex (female) - work environment sexual harassment, and constructive discharge (car salesperson). Constructive knowledge that resignation likely due to complainant's objections, page 9. Though Respondent employed fewer than five employees, constructive discharge violation found because discharge resulted from harassment.

DFEH v. Robert Daniel Peverly, aka Robert John Puff, individually and dba Music City (La Plante, a minor, La Plante, Guardian Ad Litem; Thomas, a minor; Holt, Guardian Ad Litem) FEHC Dec. No. 91-05. Sex (female) - work environment sexual harassment of two fourteen-year-old girls by owner-manager; constructive discharge (phone persons); failure to take all reasonable steps to prevent harassment and discrimination from occurring. Intolerable working conditions created by owner's ongoing sexual advances to fourteen-year-old complainants.

3. Court Decisions on Commission Cases

Fair Employment and Housing Commission v. Jack's Restaurant and Jack Schat, Owner [unpublished decision, 1989]. California Appellate Court found no authority for compensatory and punitive damages. Supreme Court denied hearing.

Huncot Properties and Charles Thomas v. Fair Employment and Housing Commission (2/14/91). Los Angeles County Superior Court remanded case to FEHC to set aside the compensatory damage award contained in FEHC Dec. No. 88-21. FEHC issued Order Modifying Decision Upon Remand (5/23/91).

4. Commission Decisions on Appeal

Madera County v. Fair Employment and Housing Commission, on writ at Superior Court.